SUPREME COURT, U. S.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1975

No. 75-195

TRIANGLE PUBLICATIONS, INC., *Petitioner,*

vs.

PAT MONTANDON, *Respondent.*

BRIEF FOR RESPONDENT IN OPPOSITION

CHARLES O. MORGAN, JR.,
343 Sansome Street, 10th Floor,
San Francisco, California 94104,
Attorney for Respondent.

PERNAU-WALSH PRINTING CO. - 562 MISSION STREET - SAN FRANCISCO, CA 94105

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OPINIONS BELOW

The opinion of the Court of Appeal is reported in *Montandon v. Triangle Publications, Inc.,* 45 Cal. App.3d 938 (1975).

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTION PRESENTED

The question as posed by the petition is misleading since the case has never been tried or decided on

the issue of intention or lack of intention (as manifested by a reading of "Questions Presented" on the first page of the opinion), but rather on the question of malice as heretofore defined by this Court.

CONSTITUTIONAL PROVISION INVOLVED

The pertinent constitutional provision is set forth in the petition.

STATEMENT OF THE CASE

Petitioner has been consistently less than candid with all appellate courts, including this Honorable Court, in its "Statement of the Case" in that it has set forth only certain facts, all the while omitting many of the essential facts adduced at the trial, and accepted by the trier of fact, the trial judge and the Court of Appeal.

The first significant omission is the fact that respondent, in September, 1968, had written a book about party giving, "How To Be A Party Girl." (R.T. 272, 273). Respondent had hired the services of a public relations expert to obtain publicity for the publication of the book and, as a consequence, arrangements were made for respondent to appear on a number of television and radio programs, including the Pat Michaels Show. Unbeknownst to both the public relations expert and respondent, the producer and host of the Pat Michaels Show decided to have

an anonymous prostitute on the same show with Ms. Montandon. This information was never conveyed to Ms. Montandon. (R.T. 91, 92, 93). The producer of the show then wrote the following release and sent it to TV Guide for publication:

> "Friday, September 20, 10:30 p.m. Pat Michaels Show.
>
> 'From Party Girl to Call Girl?'
>
> How far can the 'party girl' go until she becomes a 'call girl' is discussed with TV personality Pat Montandon, author ('How To Be A Party Girl') and a masked, anonymous prostitute."
> (Exhibit 1, R.T. 94)

Jane Young, an employee of petitioner, changed the release which was in accordance with her usual practice. The next significant omission by petitioner in its petition is the release as written by Jane Young:

> "10:30[2] Pat Michaels—Discussion. [Color] 'From party girl to call girl.' Scheduled guest: TV personality Pat Montandon and author of 'How To Be A Party Girl' *discusses her book.*"
> (Emphasis added)
> (R.T. 139)

However, the article as ultimately printed by TV Guide, did not have in it "discusses her book." Thus, the article that was finally written, read:

> "10:30[2] Pat Michaels—Discussion. [Color] 'From party girl to call girl.' Scheduled guest: TV personality Pat Montandon and author of 'How To Be A Party Girl.'"
> (Plaintiff's Exhibit "2"—R.T.)

Petitioner has also omitted the response of Jane Young as to why she put the words "discusses her book" in the release:

> "I just put it in, *I guess to make it sound a little bit better.* I really can't remember what my reasoning was at that time." (Emphasis added) (R.T. 624)

A further omission from the "Statement of the Case" is that on September 19, 1968, petitioner's employees, Mr. MacEachren (General Manager), Mrs. Young and Mr. Dorsaneo, (Regional Editor), having learned of the lawsuit, discussed at that time what had happened. (R.T. 592). At the time of trial, however, Mr. Dorsaneo was either evasive or uncertain as to the deletion of the words "discusses her book." He testified that he recalls taking something out, but can't recall what. However, in cross-examination he acknowledged that if the words were there as testified to by Mrs. Young, they would have had to have been taken out by him. (R.T. 593). No reason was given for taking the words out, although at one point he tried to intimate that it was a space problem but was impeached by prior testimony.

> "Q. Now was there sufficient room to put in the program note 'discusses her book?' Is that correct? You can look at the program note.
> A. Yes sir, it looks like it.
> Q. You are looking at the exhibit now?
> A. Yes.
> Q. So there could have been written across on the one line 'discusses her book', isn't that right?
> A. Yes sir."
> (R.T. 158)

No evidence was ever introduced to establish any space problems.

Furthermore, petitioner has completely omitted the following critical testimony:

> 1) Mr. Dorsaneo testified that when a reader looks at an item, such as the one involved herein, based upon his experience, *the reader assumes the person who is going to talk about the subject,* has some "knowledge on the subject" and *has "some experience on the subject that is going to be discussed."* (R.T. 161, 162).
>
> 2) Professor Arthur E. Hutson, Professor Emeritus of English from the University of California in Berkeley, with a career of forty (40) years teaching modern English usage and the history of the English language, testified that in his opinion the average reader would interpret the article to say that the lady (Pat Montandon) had progressed or regressed from being a party girl to a call girl, with party girl meaning a girl who likes to give parties and go to parties, and a call girl being a prostitute. (R.T. 473, 474, 475).

No contrary expert evidence was ever introduced.

Thus, the petition, to be accurate, should have presented to this Honorable Court in its "Statement of the Case" that an article was published by petitioner, TV Guide, stating as a *fact* (as opposed to the *question* posed in the original news release—see plaintiff's Exhibit "1", R.T. 94), that respondent was going to discuss the subject "How far can a party girl go before she becomes a call girl". TV Guide (through its employee Dorsaneo) knew that the reader would thereupon assume that respondent had knowledge or

experience on the subject—which admittedly was false and petitioner's employees acknowledged they had no such information.

ARGUMENT

Petitioner has vainly attempted to fabricate an issue that played no part in the trial or appeal of this case and does not warrant consideration before this Honorable Court.

This is and was a conventional libel case tried under the principles of *New York Times v. Sullivan,* 376 U.S. 254 (1964) wherein the jury was charged that before the plaintiff could recover she must prove by clear and convincing evidence that the statement was published with the knowledge that it was false or with a reckless disregard of whether it was false or not. The jury was further charged, as required by *Garrison v. Louisiana,* 379 U.S. 64, 74 (1964) and *St. Amant v. Thompson,* 390 U.S. 727 (1968), that "reckless disregard is defined as publishing the words with a high degree of awareness of their actual falsity" and that "negligence by a publisher is not the equivalent of nor is it sufficient to prove reckless disregard or knowing falsity on the part of the defendant." (R.T. 726, 727, 730). There were no instructions given to the jury on the question of intent and the question posed to this Honorable Court in the petition was not raised in the state appellate process. On that ground alone the petition should be denied. *Tacon v. Arizona,* 410 U.S. 351 (1973); *Lawn v. U.S.,* 355 U.S. 339, 362 (1948).

The evidence clearly substantiated the judgment. There can be no controversy that the article published in TV Guide did not truthfully report the press release from Channel Two (2). Petitioner took it upon itself to not tell the public that another guest, a prostitute, was to be on the show to discuss the subject. (R.T. 173). This was done knowingly and not because of any space problems. No reason was ever given for doing so.

The employees of petitioner acknowledged during the trial that, as written and/or intended by the employees, the article conveyed the impression that Pat Montandon was to be the only guest to discuss a subject of "how far can a party girl go before she becomes a call girl." (R.T. 170, 171, 616, 622, 623). *This was a knowing falsity on the part of petitioner*—no explanation, excuse or justification was ever given, notwithstanding, Mr. Dorsaneo's testimony as petitioner's Regional Editor that, based upon his experience, the reader will assume the guest has knowledge and experience on the subject that's going to be discussed (R.T. 161-162)—in this case "going from a party girl to a call girl."

The Court of Appeal in reviewing the case held:

> "The action by the TV Guide staff showed a reckless disregard of whether the statement published was true or false, because the staff was aware that the true facts, as stated in the press release, were that Pat Montandon was not a call girl but would be appearing on a show with a call girl, and a staff decision was made to leave out the crucial facts in re-writing the release, thereby

> implying that plaintiff was a call girl. This is proof of convincing clarity to support the jury's verdict that the article was not published in good faith but with actual malice."
> (Opinion, page 7)

I

THE DECISION BELOW IS CLEARLY CORRECT

Petitioner has completely distorted the opinion of the Court of Appeal in making the assertion that the Court "equated failure to notice defamatory content with publication with malice, and held that the unintentional publication of a defamation was publication with actual malice." (Pet., p. 6). As indicated in the quotation above from the opinion, the Court of Appeal held that the TV Guide staff showed a reckless disregard of whether the statement published was true or false where, knowing a prostitute would be a guest on the same show, left out such crucial facts in rewriting the release and thereby implied plaintiff was a call girl.

The Court, on pages 8 and 9 of its opinion, again restated the reckless disregard of the truth by petitioner:

> ". . . TV Guide did not truthfully report the press release from Channel 2. TV Guide, through its employees, decided not to tell the public that another guest was to be on the show to discuss the subject. This was done knowingly and not because of any space problem. *No adequate reason*

> *was given for the omission.* Both of the involved employees of TV Guide acknowledged that, as written by them, the article conveyed the impression that Miss Montandon was to be the only guest to discuss the subject of "how far can a party girl go before she becomes a call girl." *This could be considered a knowing falsity on the part of TV Guide. No reasonable explanation, excuse or justification was given.* The evidence disclosed that the average person would necessarily conclude that Miss Montandon had experience on the subject. *The TV Guide employees admitted that they did not have any information as to whether the lady had that kind of experience; hence, it was reasonable for the jury to find, which it obviously did, that the publication of this statement was a reckless disregard of the truth or falsity of the statement, which is libel."* (Emphasis added)

This conclusion was buttressed by the Court's reference to the testimony of the expert witness, a newspaper society editor, a bank vice president, two producers in the television industry and a young fan of Ms. Montandon's, all to the effect that the article as read by the average reader implied Ms. Montandon had gone from a party girl to a call girl, i.e., a prostitute.

Thus, in responding to the protestation of the TV Guide staff that they did not believe the average reader would interpret the article as relating plaintiff to a call girl, the Court, in a manner faintly reminiscent of General Anthony C. McAuliffe of Bastogne fame, but with more restraint, said tersely:

> "This testimony flies in the face of reason, as a reading of the program note reveals." (Opinion, page 7)

The protestations of a publisher in this regard have been discussed by this Court in *St. Amant v. Thompson,* 390 U.S. 727 at 732:

> "The defendant in a defamation action brought by a public official cannot, however, automatically insure a favorable verdict by testifying that he published with the belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive for example, where a story is fabricated by a defendant, is a product of his imagination, or is based wholly on an unverified anonymous telephone call, nor would they be likely to prevail when the publishers allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports."

The examples given, obviously, are not exclusive. So, in the case at the bar, the professions of good faith were obviously "unlikely to prove persuasive" where on its face the article was defamatory, countless witnesses testified to the same effect, with no contradiction by any independent witnesses; and, finally, where petitioner's editor, Mr. Dorsaneo, who did the final work on the article, testified that, based upon his experience, the reader would assume that the person who is going to talk about the subject (in this

case, Ms. Montandon), had some knowledge or experience on the subject that is going to be discussed (in this case—"going from a party girl to a call girl").

Although the Court of Appeal in a charitable vein indicated that "this result was apparently not intentional", it was clear from its opinion that with the knowledge petitioner's employees had, it was a reckless disregard of the truth or falsity to publish an article implying Pat Montandon was a call girl, or had experience in "going from a party girl to a call girl." The characterization of "not intentional" on the part of the Court however, is mere "reasoning", which this Court has heretofore deemed not sufficient to justify certiorari. (*Tyrell v. District of Columbia,* [243 U.S. 587] (1916)). Nevertheless, seizing upon this act of charity, petitioner is attempting to obliterate the basic principles applied in this case and create an issue of "intention". This Court shortly after *Sullivan* determined that intent—ill will were not the constitutional tests to be applied but rather ". . . The New York Times' standard forbids the punishment of false statements unless made with knowledge of their falsity or in a reckless disregard of whether they are true or false. . . ." (*Garrison v. Louisiana, supra,* p. 78).

A careful reading of the petition establishes that petitioner is attempting to couple a so-called "lack of intention" with a claimed lack of realization or understanding that the article was false or defamatory. The latter, however, was determined adversely to petitioner by the trier of fact, the trial judge and the Court of

Appeal and, as previously indicated, there is substantial evidence to support such adverse findings. Petitioner's statement that such facts are incontestable, not only ignores the evidence of the case, but also all the proceedings in this case thus far. Therefore, if that premise is properly stated, the petitioner published a defamatory statement knowing it was false or with a reckless disregard of its truth or falsity. The *New York Times'* standard has been met, regardless of whether the "result was apparently not intentional".

Petitioner also urges that the Court of Appeal "relied heavily on *Time, Inc. v. Ragano,* 427 F.2d 219 (5th Cir.) reh. den. (1970) a case clearly dissimilar to the instant case." This conclusion is drawn by petitioner from the simple language of the Court that "the instant case has similarities to *Time, Inc. v. Ragano.*" (Op. p. 9). Significantly, in both cases, the publishers' employees conveyed a defamatory impression. There was nothing in the *Time* opinion establishing *"intent"* as petitioner alleges. Petitioner further alleges (without any authority) that the magazine employees in *Time* used "journalistic license," (whatever that may be), to create, intentionally, a specific impression and one which might not have been factually accurate. If calling a lawyer a hoodlum is the use of "journalistic license" as characterized by petitioner, then certainly creating the false impression respondent had knowledge or experience of going from a party girl to a call girl is a similar use of the so-called "journalistic license." The cases are not dif-

ferent and there is no more of an element of intention in the *Time* case opinion than there is in the case at bar. Both are clear cut examples of publications made with knowledge of its falsity or a reckless disregard of its truth or falsity.

Petitioner cites *Waskow v. Associated Press,* 462 Fed.2d 1173 (D.C. Cir.) reh. den. (1972) as being remarkably similar to the instant action in its factual context. However, in doing so petitioner has consistently (since the trial of this action) refused to acknowledge that the *uncontradicted* evidence in *Waskow,* was that the employees were unaware of their error and the Court ruled that *there was nothing in the record* from which it could be inferred that the story was distributed or published *with knowledge that it was false or that they entertained serious doubts as to its truthfulness.* Such facts are a far cry from the present case where the employees knew what they were writing was not true and where all tribunals have rebuked their "professions of good faith."

Once again, petitioner cites *Time, Inc. v. Pape,* 401 U.S. 279 (1971) as being of some authority in this case, all the while ignoring the following distinguishing language of Justice Stewart:

> "This situation differs in a number of respects from the conventional libel case. First the publication sued on was not Times' independent report of the Monroe episode, but its report of what the civil rights commission had said about the episode. Second, the alleged damage to reputation was not that arising from mere publication, but rather that resulting from attribution of the Mon-

roe accusations to an authoritative official source." (p. 285)

"We would add, however, a final cautionary note. Nothing in this opinion is to be understood as making the word 'alleged' a superfluity in published report of information damaging to reputation. *Our decision today is based on the specific facts of the case,* involving as they do a news report of a particular government publication that purported to describe the specific grounds for perceiving in 1961 'a serious problem throughout the United States.' 'Neither lies nor false communications serve the ends of the First Amendment and no one suggests their desirability or further proliferation.'" (p. 292) (Emphasis added)

The facts in the present case are in no way similar to *Time, Inc. v. Pape* and, thus, Justice Stewart's language eliminates it as authority herein.

II

THERE IS NO CONFLICT OF DECISIONS

The petitioner has alleged that there is a clear conflict between the State of California and the District of Columbia Circuit on the precise question here at issue and cites *Waskow v. Associated Press,* as the conflicting case. The contention is grossly erroneous—there is not one word or indication in *Waskow* relating to intention or lack of intention. Again, a less than subtle approach, on the part of petitioner, to attempt to create a reviewable issue before this Court when none in fact exists.

Furthermore, as previously indicated, the cases differ factually in that in *Waskow* the *undisputed* facts did *not* permit an inference that the employees "in fact entertained serious doubts." Whereas, in the case at bar:

1) The employees knew that what they were writing was not true;

2) Jane Young added to the article: "discusses her book" to "make it sound a little bit better";

3) "Discusses her book" was then taken out, presumably by Mr. Dorsaneo, with no reason ever being given;

4) The employees of TV Guide chose not to tell the public that there was going to be somebody else on the show other than Pat Montandon discussing going from a party girl to a call girl. (R.T. 173);

5) When the petitioner's employees wrote the article they believed that the reader would conclude that Pat Montandon was going to talk about how far a party girl goes before she becomes a call girl. (R.T. 622);

6) This was the impression intended to be conveyed by TV Guide's employees. (R.T. 623); and

7) Dorsaneo knew the readers would conclude that the person on the show would have some knowledge and some experience in the subject being discussed. (R.T. 161, 162).

Clearly, there is no conflict and the instant case has met the requirement of *New York Times.*

III

THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW

Petitioner does not contend there is any important question of Federal law involved. Basically, all petitioner is seeking is another appeal, another reweighing of the evidence. As stated at the outset, this was a conventional libel case tried under the principles enunuciated by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitioner's writ of certiorari be denied.

Dated, San Francisco, California,
September 12, 1975.

Respectfully submitted,
CHARLES O. MORGAN, JR.,
Attorney for Respondent.